Ashtabula Forge, Division of ABS Company and Mary F. Duff. Case 8-CA-15317

30 March 1984

DECISION AND ORDER

By Chairman Dotson and Members Zimmerman, Hunter, and Dennis

Upon charges filed by Mary F. Duff, the Charging Party, against Ashtabula Forge, Division of ABS Company (the Respondent), 30 October 1981 the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 8, issued a complaint and notice of hearing 15 December 1981.

The parties entered into a stipulation and moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and the issuance of a decision and order. The parties waived a hearing before an administrative law judge and the issuance of an administrative law judge's decision. The parties also agreed that the charge, complaint and notice of hearing, answer, and stipulation of facts constitute the entire record in this proceeding.

By order dated 20 September 1982 the Board approved the stipulation and transferred the proceeding to itself. The General Counsel and the Respondent filed briefs.

The Board has considered the stipulation, the briefs, and the entire record and hereby makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Ashtabula Forge Company, a Delaware corporation, is engaged in the business of manufacturing bicycle parts at its facility located at 4212 Ann Avenue, Ashtabula, Ohio, the only facility involved herein. The Respondent annually ships goods valued in excess of \$50,000 directly to points located outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, Local Union 3567 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The issue before the Board is whether the Respondent violated Section 8(a)(1) of the Act by dis-

charging employee Duff after she failed to report for scheduled work because she refused to cross a lawful picket line that was maintained by a union to which she did not belong, for the sole reason that she feared for her personal safety.

The parties have stipulated that the Union, which represented a bargaining unit of the Respondent's employees at its Ashtabula facility, engaged in a lawful strike between 16 September and 6 October 1981. Duff was hired by the Respondent on 24 August 1981 as a receptionist and switchboard operator and was a probationary employee at the time of her discharge. Although Duff was not a member of the striking Union, she did not return to work on the afternoon of 30 September 1981 because she refused to cross the picket line that was established at the entrance of the Respondent's Ashtabula facility.

Duff reported to work on 1 and 2 October at the Respondent's Lakeshore Metal's facility, but on 5 October she telephoned the Respondent to advise that she would not report to work at the Ashtabula facility because she feared that crossing the picket line would jeopardize her bodily safety. The Respondent then advised Duff that she would be discharged if she failed to report to work as scheduled and that the Respondent would provide an escort for her when she walked past the picket line. Duff refused to report to work and the Respondent discharged her during the afternoon of 5 October 1981.

On 7 October Duff requested reinstatement which was refused by the Respondent

Relying primarily on *NLRB v. Union Carbide Corp.*, 440 F.2d 54 (4th Cir. 1971), cert. denied 404 U.S. 826 (1971), the Respondent contends that a nonstriking employee who refuses to cross a lawful picket line, based on fear alone, is not engaging in protected activity under Section 7 of the Act.

The General Counsel argues that the Board in Congoleum Industries, 197 NLRB 535 (1972), expressly rejected Union Carbide, above, and has consistently held that nonstriking employees who honor lawful picket lines are engaging in protected activity, regardless of their personal motives.

ANALYSIS AND FINDINGS

We find, on the record as a whole, that the Respondent violated Section 8(a)(1) of the Act when it discharged employee Mary F. Duff.

It is well established that nonstriking employees who refuse to cross a picket line maintained by their fellow employees have made common cause with the strikers, are engaged in protected concerted activities as defined in Section 7 of the Act, and may not be lawfully discharged for these activi-

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ties. 1 According to Board policy, it is not material that the employee who refuses to cross the picket line is not a member of the picketing union, is not represented as part of the collective-bargaining unit, or is motivated solely by personal fear. 2

Based on the facts as stipulated by the parties, employee Duff was discharged because she refused to cross the picket line maintained by a union to which she did not belong. The Respondent's sole argument is that Duff was motivated by fear alone, which the Respondent contends is not protected activity under Section 7 of the Act. On the contrary, the focal point of the Board's inquiry is the nature of the activity itself; the employee's motives for engaging in the activity are irrelevant. Accordingly, we find that the Respondent discharged Duff for engaging in an activity protected by Section 7 of the Act, and that the Respondent thereby committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent terminated the employment of Mary F. Duff and failed and refused to reemploy her because she engaged in concerted activities for mutual aid or protection guaranteed by the Act, we shall order the Respondent to offer her immediate reinstatement to her former position or, if it no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, by making payment to her of a sum of money equal to the amount she normally would have earned from the date of her termination to the date of reinstatement, less her net interim earnings, in accordance with F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in Florida Steel Corp., 231 NLRB 651 (1977).

CONCLUSIONS OF LAW

By terminating the employment of Mary F. Duff because she engaged in concerted activities for the

¹ NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970); NLRB v. Difco Laboratories, 427 F.2d 170 (6th Cir. 1970). mutual aid or protection guaranteed to employees by the Act, the Respondent has engaged in and is engaging in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, we issue the following.

ORDER

The National Labor Relations Board orders that the Respondent, Ashtabula Forge Division of ABS Company, Ashtabula, Ohio, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Interfering with the rights of employees to engage in protected concerted activity by discharging employees for refusing to cross a lawful picket line established at its premises.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action designed to effectuate the policies of the Act.
- (a) Offer Mary F. Duff immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of her discharge, in the manner set forth in the remedy section of the decision.
- (b) Remove from its files any reference to the unlawful discharge of Mary F. Duff on 5 October 1981 and notify her in writing that this has been done and that the discharge will not be used against her in any way.
- (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Post at its plant in Ashtabula, Ohio, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon re-

² Overnite Transportation Co., 212 NLRB 515 (1974); Congoleum Industries, 197 NLRB 534 (1972); Cooper Thermometer Co., 154 NLRB 502 (1965).

³ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ceipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting.

I cannot join my colleagues in finding that the Respondent violated section 8(a)(1) of the Act by discharging employee Duff for failing to report to work as a result of here fear of crossing a picket line set up outside the Respondent's facility. As indicated in the stipulation of facts, on 5 October 1981 Duff informed the Respondent in advance that she would not be reporting for work that day because she feared bodily harm if she had to cross the picket line. Moreover, the stipulation establishes that Duff's sole reason for refusing to cross the picket line was her fear of physical harm. In these circumstances, I see no compelling basis for treating Duff as a striker and according her the protection of the Act. Thus, since I would not find that Duff's refusal to cross the picket line was protected activity, I would dismiss the 8(a)(1) complaint. See NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir. 1971), cert. denied 404 U.S. 826 (1971).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interfere with the rights of employees to engage in protected concerted activity by discharging them for refusing to cross a lawful picket line established at out premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Mary F. Duff immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

All our employees are free to engage in concerted activities for their mutual aid and protection within the meaning of Section 7 of the Act or to refrain from such activities.

ASHTABULA FORGE, DIVISION OF ABS COMPANY